Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

BERNARD McLEOD, OMI MORNING SONG HODWITZ and PATRICK MICHAEL FINN,

Petitioners,

V.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPERIOR COURT, STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

1. Did State action in making a material witness a co-defendant charged in the same counts as Petitioners, unavailable due to her deportation within one day of her arrest mandate dismissal under California v. Trombetta, 467 U.S. 479 (1984)?

2. Were Petitioners prejudiced when the State charged them under State conspiracy law with conspiracy to violate a United States statute for which there was no State analog thereby rendering the State Court without jurisdiction but effectively precluding Petitioners from exercising their Fifth Amendment constitutional right to testify during the defense case on the then remaining counts which did not charge any federal violation?

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CITATIONS OF OPINION AND ORDERS

People of the State of California v. Bernard McLeod, et al., Memorandum Judgment of the Appellate Division of the Superior Court, State of California, County of Los Angeles Case No. BR40138 (August 1, 2000) [See Appendix A]

People of the State of California v. Bernard McLeod, et al., Order of Appellate Division of the Superior Court, State of California, County of Los Angeles Case No. BR40138 (August 29, 2000) [See Appendix A]

JURISDICTION

The decision of the Appellate Division of the Superior Court, State of California, County of Los Angeles was entered on August 1, 2000. Timely application for certification to the California Court of Appeal was filed and denied August 29, 2000.

The judgment is final, was issued by the State's highest court in which a judgment could be had, presents a

substantial federal question and was not decided on independent and adequate state grounds. See 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to bet twice put in jeopardy of lie or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a

speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

STATEMENT OF THE CASE

Petitioners and Madeleine Habib, members of Greenpeace, were arrested at approximately 2:10 p.m. on October 22, 1998 by the Long Beach Police Department in California after boarding a vessel transporting newsprint made from rain forest pulp and protesting the savaging of the rain forest. On that same date, while in the police custody, Ms. Habib was served with the "Immigration Detainer - Notice of Action" and "Notice of Revocation and

Penalty" by INS Agent James R. Lesley at 7:30 p.m.

On October 23, 1998 criminal charges were filed against Petitioners and Madeline Habib. That same day Ms. Habib was released by the Long Beach Police Department to the Immigration and Naturalization Service. She was ordered to be removed from the United States by October 25, 1998.

On November 20, 1998 Petitioners were arraigned and pleaded not guilty. Defendant Habib did not appear since after her arrest, she had been deported. On November 20, 1998, Habib's Immigration Detainer-Notice of Action and Notice of Revocation and Penalty were lodged with the Court.

On December 24, 1998 Petitioners filed a Motion to Dismiss in Department 7 of the Municipal Court of the Long Beach Judicial District wherein they argued that since there was state action in making a material witness (Habib) unavailable by that witness's deportation, dismissal is mandatory

under People v. Mejia 57 Cal.App.3d 575, 579 (1976). Decisions under Mejia and its progeny are decided under federal law decisions Subsequently on January 16, 1999, Supplement to Motion to Dismiss was filed containing the declaration of Madeleine Habib who had been deported but who represented that she would have testified favorably to Petitioners. On or about January 25, 1999 a Response to Motion to Dismiss Pursuant to People v. Mejia was filed. All parties agreed that federal authority was controlling. On January 27, 1999, a hearing on Appellant's motion to dismiss was held in Department 7 of the Long Beach Municipal Court before Commissioner Jeffrey P. Castner. Petitioners argued that under Mejia and federal authority dismissal was mandated because state action in the deportation of material witness Habib made her unavailable for trial and that Mejia was underpinned by California v. Trombetta, 467 U.S. 491 (1984). The motion was denied (R.T.

1/27/99, 7) as were subsequent writs to the Appellate Department of the Superior Court and the Court of Appeal.

On June 21, 1999, the morning of trial, the prosecution filed a Second Amended Complaint eliminating four of the earlier charges. A motion for reconsideration of the motion to dismiss was made before Commissioner Castner and denied. Trial by jury was then commenced and continued with trial testimony through June 25, 1999.

Count I charged a conspiracy to violate 18 United States Code, Section 2279, predicated upon use of the California Penal Code Section 182(a)(1) definition of conspiracy. All other counts charged State law violations. Repeatedly Petitioners unsuccessfully sought to have Count I dismissed since the Court was without subject matter jurisdiction to charge a Federal crime. Although the jury failed to reach a verdict on Count I, the effect of its inclusion was to prevent Petitioners from testifying due to the threat of a

possible Federal charge later. Federal agents had participated in Petitioners' arrest.

Motions to dismiss and for a new trial were made after receipt of the jury verdict but were denied. R.T. 7/1/99, 7. The Federal questions addressed herein were renewed and denied again at that time.

The Appellate Division of the Superior Court, Sate of California, County of Los Angeles heard the appeal but refused to certify the case to the Court of Appeal, thereby precluding Petitioners from appeal to a higher State court.

ARGUMENT

1. State action in making a material witness co-defendant unavailable due to her deportation within one day of her arrest mandates dismissal under California v. Trombetta, 467 U.S. 479 (1984).

Prior to the arraignment of Petitioners McLeod, Hodwitz, and Finn,

co-defendant Madeleine Habib was deported. Petitioners filed a motion to dismiss wherein they alleged that Madeleine Habib was a material witness for purposes of proceedings in their case and that under People v. Mejia, 57 Cal. App. 3d 574, 579, 129 Cal. Rptr. 192, 196, (1976) her unavailability due to her deportation mandates dismissal of their case. A declaration submitted by Madeleine Habib established that her testimony at trial would be favorable to Petitioners. The court denied the motion to dismiss.

The court in People v. Mejia, supra, stated:

> "If, however, state action has made a material witness unavailable, dismissal is mandated by due process and a defendant's constitutional right to a fair trial. The principles involved were recently summarized by the Supreme Court in Bellizzi v. Superior Court, 12 Cal. 3d 33, beginning at page 36 [115

Cal.Rptr. 52, 524 p. 2d 148]: "The fundamental due process principal...is that the prosecution may not deprive an accused of the opportunity to present material evidence which might prove his innocence. Even if the prosecution's motives are "praiseworthy" they can not prevail when they "inevitably" result intentionally or unintentionally in depriving the defendant of a fair trial." [citing cases].

With the passage of Proposition 8 (see California Constitution Article I, Section 28, subdivision (d)) the federal standards for determining whether a witness was "material" supplanted those of Mejia.

"Conflicting authority exists on which federal standard to apply…At this writing, the question of which federal standard to follow must be considered unsettled."

CEB California Criminal Law Procedure and Practice (4th ed. 1998) §48.9 at 1301. The two federal standards are those set forth in California v. Trombetta 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed 2d 413 (1984) and United States v. Valenzuela-Bernal 458 U.S. 858, 102 S.Ct. 3440, 72 L.Ed.2d 1193 (1982). Under the Trombetta standard lost evidence is material for purposes of sanctions if its exculpatory value was apparent before it was destroyed. Under Valenzuela-Bernal testimony is material for purposes of sanctions if a "plausible" showing is made that it was material, was favorable to the defendant, and was not cumulative.

In People v. Valencia 218 Cal.App.3d 8098, 267 Cal.Rptr. 257 (1990) the court followed the materiality test of Valenzuela-Bernal.

In People v. Lopez, 198 Cal. App. 3d 1325, 243, Cal. Rptr. 590 (1988), the Court held that in determining whether a witness was "material" the Trombetta standard is applied. The

Lopez court refused to follow United States v. Valenzuela-Bernal (1988) 458 U.S. 858, 102 S.Ct. 3440, 73 L.Ed. 2d 1193 (1988), because that case was older than Trombetta and Valenzuela-Bernal did not intend to announce a separate standard for loss of testimonial evidence as opposed to other evidence. Under the Trombetta standard as measured by the court in the Lopez opinion, a witness is material if she has apparent exculpatory value and that witness was in a position to perceive what took place from a sufficiently proximate vantage point. Clearly, the charged co-defendant, Madeleine Habib, was in such a posture given her site on the vessel from which she was removed which forms the predicate of this case. Her testimony has the possibility for great exculpatory value.

The responsibility for causing or permitting Madeleine Habib to be deported falls squarely on the shoulders of the prosecution. She was

deported three days after she was arrested by the Long Beach Police Department. No effort was made to notify either Petitioners of the possibility of deportation of Habib or the INS or any judicial officer to prevent her deportation. For example, a judicial recommendation against deportation has been absolutely binding on the Attorney General and leaves him or her with no discretionary authority. Velez-Lozano v. Immigration and Naturalization Service, 463 F.2d 1305, 1307-8 (D.C. Cir. 1992).

Under the authority of United States v. Lujan-Castro 602 F.2d 877 (9th Cir. 1979) a person arrested along with undocumented persons may be provided a form advising him or her of the right to have the non-citizen witnesses detained. The form advises that the witness, if deported, could not be compelled to return and that the person arrested has the right to consult with counsel before deciding whether detention of the non-citizen is

desired. No such form or information was provided Petitioners.

After hearing the arguments at the motion to dismiss the Municipal Court denied the motion and followed the Valencia opinion. R.T. 1/27/99, 7. In setting forth the rationale underpinning its decision the Court evidenced a lack of understanding of the case. The Court determined that the issue of materiality was governed by whether witness Habib had "consent to enter or board the vessel." R.T., 1/27/99, 5. However, consent to enter or board the vessel was not an issue in any of the ten counts presented. The Court found Habib's declaration was irrelevant since what she was in a position to see and hear, including commands by the captain and police, did not matter "after they had illegally boarded the vessel." R.T. at 6. In actuality these observations by Habib touch upon every count of the complaint and are extremely relevant. Moreover,

Habib's declaration exculpates the Petitioners.

The Court then engaged in the speculation that Habib must have made a conscious choice to be deported and therefor the government did not act in bad faith. R.T. at 6, 11. 15-26. He totally ignored Habib's statement,

> "To my knowledge no effort was made by local law enforcement officers to delay or prevent my deportation although they knew I was a witness to what occurred on the ship that day."

The test for materiality, which apparently escaped the Court, is either that of Trombetta, lost evidence is material if its exculpatory value was apparent before it was destroyed, or Valenzuela-Bernal, testimony is material if a "plausible" showing is made that it was material, favorable to the defendants and not cumulative. Although Petitioners advanced the Trombetta test under either test the Petitioners were entitled to have the case against them dismissed.

Under Trombetta the lost testimony of Habib was material since its exculpatory value was apparent before it was destroyed (deported). Clearly, local police officers working in conjunction with federal officers were aware that Habib as a co-defendant could be expected to present testimony at trial which would be exculpatory. Yet the police did nothing to prevent or delay her deportation. Nor did they notify Petitioners of their rights to prevent Habib's deportation to preserve her testimony.

Under Valenzuela-Bernal Habib's testimony was material since a "plausible" showing was made that it was material, favorable to the defense and not cumulative. Valenzuela-Bernal involved deported aliens who witnessed a criminal act. However, the differences between a neutral witness and a co-defendant are great. Here the prosecution obviously knew that a co-defendant's testimony is more likely to be favorable to the defense than that

of a supposedly impartial witness who does not have any direct involvement in the activity as would a co-defendant. Additionally in the deported alien cases there are no statements received whereas here there is a sworn statement favorable to the defense which eliminates any speculation about whether Habib's testimony would be favorable.

Although the prosecutor argued that what Habib would testify to would be merely cumulative to what the police would say (R.T. at 5), this can never be the case with a defendant. This is particularly true here because Habib's declaration exonerates the Petitioners. Unless the police testimony exonerated the Petitioners, Habib's testimony would not be cumulative.

The prosecution refused a defense request that Ms. Habib be granted immunity so that she could be encouraged to return to the Untied States and provide testimony in this case.

Valenzuela-Bernal only requires a "plausible" showing. Under this test if the Habib declaration is examined it is obviously "plausible" that her testimony, even if said to involve conclusions or hearsay, is material, favorable to the defense and not cumulative.

Because Madeleine Habib has been deported, she has become totally unavailable as a witness for the defense. It would be a federal felony under 8 U.S.C. §1326 for her to re-enter the country to be a witness for Petitioners. Accordingly, it is patent that Petitioners' case has been greatly prejudiced by the inaction and omissions of the prosecuting agencies in this case. The only appropriate remedy is dismissal of the case as to all counts against Petitioners.

2. Petitioners were prejudiced by the conspiracy to violate United States law charge (Count I) which was unlawfully brought in violation of the Court's jurisdiction and which effec-

tively precluded them from exercising their constitutional right to testify during the defense case on the then remaining counts which did not charge any conspiracy.

Court I charged Petitioners with conspiring under California Penal Code Section 182(a)(1) to board a vessel before arrival in port in violation of Title 18, United States Code, Section 2279.

Petitioners repeatedly but unsuccessfully argued that the Court was without jurisdiction to proceed on a charged conspiracy to violate federal law. R.T. 6/21/99,40-41; 6/22/99, 3-9, 11-14; 6/24/99. 5-9.

Since jurisdictional issues may be raised at any time, the Court clearly erred in not dismissing Count I.

California Penal Code §777 provides, in pertinent part:

> "Every person is liable for punishment by the laws of this State, for a public offense committed by him therein, except

where it is by law cognizable exclusively in the courts of the United States;…"

Plainly, jurisdiction over the crime of boarding a vessel before arrival in port is exclusively federal under Title 18, United States Code, Section 2279. There is no counterpart statute in California. The import of Penal Code §777 is clear: where, as here, there is no recognized public offense under California law a person may not be punished for such an act. Moreover, where, as here, federal law governs, a person cannot be punished by California courts. This has been the law for more than 130 years. In People v. Kelly (1869) 38 C.145, 150 the Supreme Court held,

"The State tribunals have no power to punish crimes against the laws of the United States, as such. The same act may, in some instances, be an offense against the laws of both, and it is only as an offense against the State

laws that it can be punished by the State, in any event." (emphasis in original)

In an effort to maximize the criminal exposure of Petitioners the prosecution filed the ludicrous charge that a conspiracy occurred in California to violate federal law and that Penal Code Section 182(a)(1), the conspiracy statute, manufactures jurisdiction. Section 182(a)(1) provides California jurisdiction "(I)f two or more persons conspire...to commit any crime." The key word here is "crime." It must be a crime recognized by statute in California, the sovereign which enacted the conspiracy statute to assist the enforcement of "crimes" defined in its Penal and other Codes. The United States is a separate sovereign which defines its own crimes. However, under the conspiracy theory advanced by the prosecution, California courts have jurisdiction to prosecute acts which are non-criminal in California but

criminally proscribed elsewhere. This approach leads to mind boggling possibilities. If it were a crime to eat coconuts in Tonga on Fridays and two people conspired in Los Angeles to fly to Tonga to do that, that would be a crime prosecutable in California. Suppose some state had an anti-miscegenation law, it could be enforced in California under a conspiracy theory. California residents would be forced to know and comply with the laws of every country, state, county and Podunk in the world. Whether these laws would be enforced would depend upon the prosecution's largesse. Due process would be abandoned.

Although the jury hung on Count I, the prejudice to Petitioners was palpable. At the time of the arrests of Petitioners, FBI and INS agents were present. R.T., 6/22/99, 54. The Coast Guard had contacted the United States Attorney re prosecution. R.T. 6/23/99, 84. The legitimate concern Petitioners had was that if they testified

regarding the alleged §2279 conspiracy that their testimony could lead to a federal prosecution. There is no federal analog to Penal Code §656 preventing prosecution in the federal courts. Moreover, had Petitioners testified, the reporter's transcript could have been turned over to the United States Attorney on a silver platter. The effect of Count I was to effectively preclude Petitioners from

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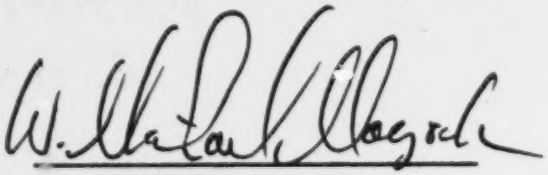
exercising their right to testify on their own behalf regarding the crimes which were legally charged. R.T. 7/1/99, 6.

CONCLUSION

In view of the foregoing, the Petition for Writ of Certiorari should be granted and the judgment of the lower court reversed with directions to dismiss the charges.

Respectfully submitted,



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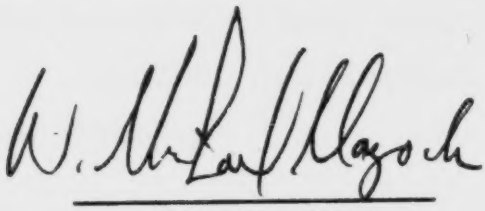
CERTIFICATE OF SERVICE

I, W. MICHAEL MAYOCK, certify that I duly mailed copies of the foregoing to Ms. Sandra Stolpe, Deputy City Prosecutor, Public Safety Building, 400 West Broadway, Long Beach, California 90802.

This 27th day of November, 2000.



W. MICHAEL MAYOCK

APPENDIX A

FILED
Los Angeles Superior Court
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John A. Clarke, Clerk

By B.J. SCHNEIDER, DEPUTY

APPELLATE DIVISION OF THE
SUPERIOR COURT

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA,	)	No. BR40138
Plaintiff and Respondent,	)	Long Beach Trial Court
v.	)	
BERNARD McLEOD, et al.,	)	No. 8LM08399
Defendants and Appellants.	)	MEMORANDUM JUDGMENT

This cause having been submitted for decision, and fully considered, judgment is ordered as follows:

The judgment is affirmed.

Defendants/appellants Bernard McLeod, Omi Morning Song Hodwitz and Patrick Michael Finn appeal from their convictions for violations of Penal Code section 647, subdivision (h) (loitering), Penal Code section 416, subdivision (a) (failure to disperse) and Penal Code section 602, subdivision (n) (2) (trespassing). Appellant Hodwitz appeals from her conviction for violation of Penal Code 148, subdivision (a)(1) willfully resisting, obstructing or delaying a peace officer).

The jury could not reach a verdict on the charged offense of conspiracy to violate 18 United States Code section 2279, boarding a vessel before arrival. The jury was also unable to reach a verdict on the resisting arrest charge

as to appellants McLeod and Finn. The trial court dismissed these charges.

Appellants contend that state action making a material witness unavailable due to her deportation mandates dismissal of the case and that they were prejudiced by the charge of conspiracy to violate federal law, which was brought in excess of the trial court's jurisdiction and which precluded appellants from exercising their right to testify as to the remaining charges.

When state action results in the deportation of a witness, and the lack of that witness deprives a defendant of the right to a fair trial, the charges against the defendant must be dismissed. (People v. Mejia (1976) 57 Cal.App.3d 574, 579.)

Proposition 8 is applicable to the dismissal of charges in a Mejia motion. (People v. Valencia (1990) 218 Cal. App. 3d 808, 818-819.) Therefore, whether the deportation of the witness was sufficient to deny appellants there right to a fair trial is determined by the federal standard.

The trial court determined that the federal standard to determine the materiality of the potential testimony of Madeleine Habib, the deported witness, was determined in People v. Valencia, supra, (1990) 218 Cal.App.3d 8087. The court in that case concluded that the test announced in United States v. Valenzuela-Bernal (1981) 458 U.S. 858, was the controlling federal standard. The test requires that "the charges should not dismissed unless the

defendant 'makes a plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses.'" People v. Valencia, supra, 458 U.S. at 873.)

Appellant contends that the trial court erred in applying this standard. Appellant asserts the correct federal standard was followed in People v. Lopez (1988) 198 Cal. App. 3d 135; where that court determined that the applicable standard was stated in California v. Trombetta (1984) 467 U.S. 479.

The court in Lopez stated that the test announced in Trombetta, a case which concerned demonstrative evidence, was a "more definitive and precise

formulation of the constitutional standard of materiality in all loss of evidence cases." (Lopez, 198 Cal.App.3d at 145.) The Trombetta standard "required the evidence to 'possess and exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.' (467 U.S. at p. 489. . . .)" (Id. At 144.)

The court reasoned that prior to Proposition 8, the materiality of lost or destroyed physical evidence and unavailable witnesses were reviewed under the same standard.[1] The court found unpersuasive the argument that

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[1] See People v. Mejia (1976) 57 Cal.App.3d 574 and People v. Hitch (1974) 12 Cal.3d 641.

there is a distinction between the types of evidence which required a different standard of materiality. (Lopez at 145.)

The court in Valencia rejected the Lopez analysis. It concluded that there is no language in Trombetta evidencing an intent to supersede Valencia-Bernal, even though Valencia-Bernal is specifically referenced in the opinion. Additionally, Trombetta addressed different aspects of the issue of missing evidence, discussing Fourteenth Amendment violations in contrast to the Fifth Amendment and Sixth Amendment violations discussed in Valenzuela-Bernal. Additionally, the Court was clear that in the Trombetta opinion it was addressing an issue which had never before been directly

addressed, "the government's duty to take affirmative steps to preserve physical evidence on behalf of the defendants." (Valencia, supra, 218 Cal.App.3d at 820-825.)

We find the reasoning of Valencia more persuasive than that of Lopez. We note that a considerable portion of the Valenzuela-Bernal opinion considered the competing interests of deporting illegal aliens and preserving evidence and the importance of both interests. ". . .[I]t's exercise of these manifold responsibilities is not to be judged by standards which might be appropriate if the Government's only responsibility were to prosecute criminal offenses." (Valenzuela-Bernal 458 U.S. at 866.) There was no such competing interest in Trombetta.

The trial court correctly applied the federal standard established in Valenzuela-Bernal.

Appellants contend that the trial court erred in its application of the test because there was a plausible showing that Habib's testimony would have been material and favorable to the defense and that it was not cumulative.

Habib submitted a declaration of her proposed testimony. The declaration was based on both personal knowledge and on information and belief. At trial, Habib would not have been permitted to testify to statements based on information and belief. (Evid. Code, §702.) These include statements that the appellants did not conspire to commit any crime, did not

attempt or act to damage or destroy any property. Additionally, she states that the appellants did not know that the persons they replaced on the ship had boarded without permission and that appellant's purpose was to protest peacefully. She does not state a basis for this knowledge. There are no facts establishing that she had ever even spoken to the appellants.

She concludes that appellants did not knowingly delay or obstruct the police, knowingly fail to disperse when ordered to do so by the police, willfully refuse to leave the ship when requested by the owner, or conspire to board a vessel before its arrival. She also does not state any basis for personal knowledge of these conclusions. The evidence given at trial established

that Habib was separated from the appellants during the incident.

Her declaration also states that because of the noise from the boats, helicopters, water and other individuals, it was difficult for her and the others to understand what was being said. She could testify to the noise where she was located. She could not testify that the noise interfered with communication where the appellants were located. Additionally, there witnesses at the trial who were present at the scene and could testify as to the general noise level, making her testimony cumulative.

"We cannot speculate on [Habib's] anticipated testimony and must limit our analysis to the showing contained in the record before us." (Valencia,

supra, at 825-826.) Since the only material testimony Habib could have given, based on her declaration, is that the site of the arrests was noisy and there were other witnesses who could testify to the noise level, appellants have not established that her testimony would have been material, favorable and not cumulative. The trial court did not err in denying appellants' motion to dismiss based on Habib's deportation.

Appellants next contend that they were prejudiced by the charge of conspiracy to violate federal law, which was brought in excess of the trial court's jurisdiction and which precluded appellants from exercising their right to testify as to the remaining charges.

Appellants contend that they cannot be charged with an offense which is exclusively federal jurisdiction (Pen.Code, §777; People v. Kelly (1859) 38 Cal. 145, 150) and the offense of attempting to board a vessel before arrival is such an exclusive federal offense. Appellants further contend, without citation to authority, that they cannot be prosecuted for conspiracy by the state of California for an offense which is not a crime in California. Appellants then make the conclusory statement that had they testified in their own defense regarding this offense they would have exposed themselves to federal charges of attempting to board a vessel before arrival and that this exposure prevented appellants from testifying at

the trial. Appellants then assert, without explanation, that this federal exposure resulted solely because of the conspiracy charge. Again, appellants failed to reference any authority for this position.

The parties have referenced no authority, and we have found none, that directly addressed whether there is subject matter jurisdiction to prosecute a charge of conspiracy to commit a violation of federal law when the entire conspiracy occurs within this state. It is, however, unnecessary to determine whether there was subject matter jurisdiction.

Appellants have failed to establish, by either facts or citation to authority, that they were prejudiced by the inclusion of the charge or that

such prejudice requires reversal. They were not convicted of the charge. They have failed to explain how the inclusion of the charge caused their potential testimony to expose them to a federal charge and why that exposure would not have existed if that conspiracy charge had not been brought.

"[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass on it without consideration. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 594, p. 627.)

Additionally, "[w]here a point is merely asserted . . . without any argument of or authority for its

proposition, it is deemed to be without foundation and requires no discussion." (People v. Ham) (19709) 7 Cal.App.3d 768, 783, disapproved on another ground in People v. Compton (1971) 6 Cal.3d 55, 60, fn. 3; People v. Dougherty (1982) 138 Cal.App.3d 278, 283.)

The judgment is affirmed.

/S/

Beverly, J.

We concur.

/S/

Todd, Acting P.J.

/S/

Kriegler, J.

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LOS ANGELES SUPERIOR COURT
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APPELLATE DIVISION OF THE SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. BERNARD McLEOD, OMI MORNING STAR HODWITZ, PATRICK MICHAEL FINN, Defendants and Appellants.	No. BR 40138 Long Beach Trial Court No. 8LM08399 ORDER

Appellants' petition for publication of the opinion and judgment in this case or for certification of the cause to the Court of Appeal has been filed and fully considered.

Said petition is hereby denied.

Beverly, P.J.

Kriegler, J.